Supreme Court, U.S.
FILED

941526 MAR 15 1995

No. OFFICE OF THE CLERK

In the

Supreme Court of the United States

October Term, 1994

JAMES C. BELL, U.S. MARINE CORPS, *Petitioner,*

V.

UNITED STATES OF AMERICA, *Respondent.*

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

JOHN FRANCIS HAVRANEK
Captain, U.S. Marine Corps
Counsel of Record

PHILIP LAWRENCE SUNDEL
Lieutenant, Judge Advocate
General's Corps
U.S. Naval Reserve

Navy-Marine Corps Appellate
Defense Division
Washington Navy Yard, Building 111
Washington, D.C. 20374-1111
(202) 433-4161

89 pp

QUESTION PRESENTED

WAS PETITIONER'S RIGHT TO DUE PROCESS VIOLATED WHEN HE WAS COURT-MARTIALED FOR HIS ACTIONS INSTEAD OF BEING ALLOWED TO PARTICIPATE IN A REHABILITATION PROGRAM PROVIDED IN MARINE CORPS REGULATIONS?

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS 3

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT

PETITIONER'S RIGHT TO DUE PROCESS WAS VIOLATED WHEN HE WAS NOT PLACED IN A CHILD ABUSE REHABILITATION PROGRAM, AS PROVIDED FOR IN MARINE CORPS REGULATIONS, AND WAS COURT-MARTIALED INSTEAD. 8

CONCLUSION 11

APPENDIX A (Opinion of the U.S. Court of Appeals for the Armed Forces) 1a

APPENDIX B (Opinion of the U.S. Navy-Marine Corps Court of Military Review) 2a

APPENDIX C (Opinion of the U.S. Navy-Marine Corps Court of Military Review) 13a

APPENDIX D (Order of the U.S. Court of Appeals for the Armed Forces) 22a

APPENDIX E (Order of the U.S. Court of Appeals for the Armed Forces) 25a

APPENDIX F (Opinion of the U.S. Navy-Marine Corps Court of Military Review) 27a

APPENDIX G (MCO 1752.3a) 40a

APPENDIX H (White Letter) 70a

TABLE OF AUTHORITIES

Cases:

United States v. Caceres, 440 U.S. 741 (1979) 8
United States v. Raley, 360 U.S. 423 (1959) 8
United States v. Weiss, 114 S.Ct. 752 (1994) 11
United States v. Bell, 28 M.J. 1062 (N.M.C.M.R. 1989) . . . . . passim
United States v. Bell, 29 M.J. 442 (C.M.A. 1989) . . 6
United States v. Bell, 30 M.J. 168 (C.M.A. 1990) . . 6
United States v. Bell, No. 89 1067 (N.M.C.M.R. July 31, 1991) 7
United States v. Bell, 39 M.J. 684 (N.M.C.M.R. 1993) 7, 8, 9
United States v. Bell, __ M.J. __, No. 63164/MC (C.A.A.F. December 15, 1994) 7

Constitutional Provisions:

U.S. Constitution, amendment V . . . . . passim

Statutes and Rules:

Article 22, U.C.M.J., 10 U.S.C. § 822 7
Article 60, U.C.M.J., 10 U.S.C. § 860 7
Article 134, U.C.M.J., 10 U.S.C. § 934 6
28 U.S.C. § 1259(3) (Supp. IV 1992) 2
Manual for Courts Martial, United States, 1984, Rule for Courts-Martial 1106 7
Manual for Courts Martial, United States, 1984, Rule for Courts-Martial 1107 7

Miscellaneous:

MCO 1752.3a, (April 6, 1987) . . . . . passim
MCO P5000.21, (April 22, 1994) 4
White Letter, (February 26, 1988) . . . . . passim

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

No. 94-

JAMES C. BELL, U.S. MARINE CORPS, *Petitioner,*

V.

UNITED STATES OF AMERICA, *Respondent.*

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the United States Court of Appeals for the Armed Forces[1], *United States v. Bell* __ M.J. __ , No. 63164/MC (C.A.A.F. December 15, 1994), is reprinted as Appendix A at Pet. App. 1a.

The November 10, 1993 opinion of the Navy-Marine

---

[1] The United States Court of Appeals for the Armed Forces was formerly known as the United States Court of Military Appeals. All orders of this court were issued prior to the name change, but the final affirmation of appellant's case was done subsequent to the name change, so petitioner will refer to this court by its new name throughout this petition.

Corps Court of Military Review[2], *United States v. Bell*, 39 M.J. 684 (N.M.C.M.R. 1993) is reprinted as Appendix B at Pet. App. 2a.

The July 31, 1991 unpublished opinion of the Navy Marine Corps Court of Military Review, *United States v. Bell*, No. 89 1067 (N.M.C.M.R. July 31, 1991), is reprinted as Appendix C at Pet. App. 13a.

The March 21, 1990 court order setting aside the June 26, 1989 decision of The Navy-Marine Corps Court of Military Review, *United States v. Bell*, 30 M.J. 168 (C.M.A. 1990) (summary disposition), is reprinted as Appendix D at Pet. App. 22a.

The November 27, 1989 court order granting Petitioner's petition, *United States v. Bell*, 29 M.J. 442 (C.M.A. 1989), is reprinted as Appendix E at Pet App. 25a.

The June 26, 1989 opinion of the Navy-Marine Corps Court of Military Review, *United States v. Bell*, 28 M.J. 1062 (N.M.C.M.R. 1989), is reprinted as Appendix F at Pet. App. 27a.

JURISDICTION

The decision of the United States Court of Appeals for the Armed Forces was rendered on December 15, 1994. Jurisdiction of the Court is invoked under 28 U.S.C. § 1259(3) (Supp. IV 1992).

---

[2] The Navy-Marine Corps Court of Military Review has been renamed the Navy-Marine Corps Court of Criminal Appeals. All cases relevant to this petition were decided before the name change, so the original name is used in this petition.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment provides:

> No person shall be . . . deprived of life, liberty, or property without due process of law.

STATEMENT OF THE CASE[3]

On April 6, 1987, Marine Corps Order (MCO) 1752.3a was promulgated, and established policies, procedures, and guidance for the operation of the Marine Corps Family Advocacy Program. Appendix G at Pet. App. 40a. This order provides in part:

Commanders can break the cycle of child and spouse abuse through identification and treatment. They should encourage Marines who are proven performers to enter treatment or rehabilitation programs. Commanders should be guided in their determinations by the following factors:

> (1) the Marine's demonstrated record of performance,
>
> (2) potential for future service,
>
> (3) motivation to change the behavior, and
>
> (4) the evaluation by competent counselors or medical personnel that the Marine is a good candidate for successful treatment.

---

[3] The statement of the case is drawn from *United States v. Bell*, 28 M.J. 1062 (N.M.C.M.R. 1989).

Commanders shall apply disciplinary or administrative sanctions for acts of abuse, when considered appropriate. Disciplinary or administrative action is most appropriate when:

> (1) offenders fail to acknowledge or assume responsibility for their behavior,
>
> (2) behavior of the offenders is compulsive, repeated, and represents a specific danger,
>
> (3) the victim has suffered serious injury, or
>
> (4) There is sufficient evidence for conviction and testifying in court is in the best interest of the victim. Commanders should carefully consider the impact of any punishment on the victim and the entire family.

Id. ¶ 4(e).

After the promulgation of this order the Commandant of the Marine Corps, General A. M. Gray, issued a "White Letter"[4] in which he expressed support for families in which child abuse has occurred. Appendix H at Pet. App. 71a. In his letter, the Commandant stated:

> Long-term command attention is in order to ensure the family receives needed

---

[4] A White Letter is reserved as a means for the Commandant to express his personal thoughts and policies on a variety of topics that he considers in need of command emphasis. White Letters are sent to all commanding officers and officers in charge and are kept in organizational files. MCO P5000.21, 22 April 1994, ¶ 8206.

> therapeutic and other forms of support. Further, those involved in dealing with the Marine accused's offense must be sensitive to the impact of their actions upon the family. In this regard, when determining the course to be taken with respect to the offender, I urge you to consider the possibility of non-criminal responses. In some cases, such may be appropriate and in the best interests of the family.

Id. ¶ 4.

Petitioner revealed to his wife, while discussing their estranged relationship, that he had sexually abused their two daughters. Petitioner admitted to fondling the buttocks of one daughter and inserting his finger in the vagina of the other. These were isolated incidents and not of a repetitive nature. Petitioner, his wife, and their two daughters went to the Family Service Center for marital counseling. During this counseling, Petitioner admitted to the sexual abuse of his two daughters and requested treatment. In support of his request, Petitioner produced a copy of the Commandant's White Letter discussing the treatment sought. The Family Services counselor advised Petitioner of the resources available to him for treatment.

Following the advice of the Family Services counselor, Petitioner enrolled, at his own expense, in two separate treatment programs in the local community. Petitioner used civilian facilities because the Marine Corps and Navy did not have the resources to provide such counseling.

At the time of Petitioner's court-martial it was shown that Petitioner was participating in these treatment programs; that he had been cooperative since his reporting

of the abuse; remorseful for his conduct; sincere in his treatment; concerned for the well being and treatment of his family; that he was a positive influence on his family; and, that he was well upon his way to rehabilitation. Additionally, testimony and evidence was received that Petitioner was a proven performer and motivated to change his behavior.

At his court-martial, Petitioner pleaded guilty to two specifications of indecent acts in violation of Article 134, Uniform Code of Military Justice [hereinafter U.C.M.J.], 10 U.S.C. § 934 and was sentenced to confinement for three years, reduction to pay grade E-1, and to be discharged with a dishonorable discharge. The convening authority approved the sentence as adjudged, but suspended all confinement in excess of ten months for a period of twelve months.

On appeal, the Navy-Marine Corps Court of Military Review, in a divided opinion, affirmed Petitioner's conviction and sentence, except for the dishonorable discharge which the court found to be inappropriately severe and commuted to a bad-conduct discharge. *United States v. Bell*, 28 M.J. 1062 (N.M.C.M.R. 1989).

The United States Court of Appeals for the Armed Forces, granted Petitioner's petition on three issues. *United States v. Bell*, 29 M.J. 442 (C.M.A. 1989). Subsequently, the court ordered the Navy-Marine Corps Court of Military Review, through its fact finding powers, to re-examine the facts and circumstances of Petitioner's case in light of MCO 1752.3a and the Commandant's White Letter. *United States v. Bell*, 30 M.J. 168 (C.M.A. 1990).

In turn, the Navy-Marine Corps Court of Military Review set aside the convening authority's action[5] and ordered that the convening authority take a new action pursuant to a new staff judge advocate's recommendation[6] in light of MCO 1752.3a. *United States v. Bell*, No. 89 1067 (N.M.C.M.R July 31, 1991).

On March 2, 1992, after the staff judge advocate had provided a new recommendation, the convening authority approved the findings and sentence as adjudged at trial. The Navy-Marine Corps Court of Military Review then affirmed the findings and sentence, specifically holding that MCO 1752.3a and the Commandant's White Letter did not present a bar to prosecution. *United States v. Bell*, 39 M.J. 684 (N.M.C.M.R. 1993). The Court of Appeals for the Armed Forces summarily affirmed Petitioner's case on December 15, 1994. *United States v. Bell*, __ M.J. __, No. 63164/MC (C.A.A.F. December 15, 1994).

---

[5] The convening authority is the individual who statutorily creates the court-martial and reviews the record upon its conclusion. 10 U.S.C. §§ 822, 860. Having received a recommendation from his legal advisor *see infra* note 6 and accompanying text, the convening authority acts upon the court-martial's findings and sentence by; (1) approving them; (2) disapproving them; (3) mitigating them; or (4) ordering a rehearing. Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1107 [hereinafter R.C.M.].

[6] The legal advisor to the convening authority, the staff judge advocate, is statutorily required to prepare a letter advising the convening authority of what actions he can take upon the findings and sentence in a particular case. The staff judge advocate is also required to recommend an appropriate action. R.C.M. 1106.

REASONS FOR GRANTING THE WRIT

PETITIONER'S RIGHT TO DUE PROCESS WAS VIOLATED WHEN HE WAS NOT PLACED IN A CHILD ABUSE REHABILITATION PROGRAM, AS PROVIDED FOR IN MARINE CORPS REGULATIONS, AND WAS COURT-MARTIALED INSTEAD.

Petitioner detrimentally relied upon MCO 1752.3a and the Commandant's White Letter when he went to the Family Service Center and informed a counselor that he had sexually abused his two daughters. Petitioner presented the counselor a copy of the Commandant's White Letter as a basis for seeking counseling and treatment.

Petitioner's case is one in which "the Due Process Clause is implicated because an individual has reasonably relied on agency regulations promulgated for his guidance or benefit and has suffered substantially because of their violation by the agency." *United States v. Caceres*, 440 U.S. 741, 752-53 (1979); *see also United States v. Raley*, 360 U.S. 423 (1959).

Petitioner was precisely the type of individual contemplated by MCO 1752.3a and the Commandant's White Letter and met the requirements established by both. *Bell*, 28 M.J. at 1065-66. After ordering and receiving the second convening authority's action, the Navy Marine Corps Court of Military Review made a new finding that Petitioner was not a "voluntary self-referral" as contemplated by the Marine Corps Order. *Bell*, 39 M.J. at 687. This was contrary to that court's original finding that Petitioner was a "voluntary self-referral." *Bell*, 28 M.J. at 1062.

The Marine Corps Order does not require a "voluntary self-referral" for the Family Advocacy Program to apply, but this is a significant factor in determining the applicability of the order. A finding that Petitioner was a "voluntary self-referral" is the first step towards demonstrating petitioners motivation to change his behavior, accepting responsibility for his actions, facilitating an evaluation, and for formulating a treatment plan. MCO 1752.3a at ¶'s 4,9. While a finding that Petitioner was not a "voluntary self-referral" tends to demonstrate that he lacked these key factors of rehabilitation and thereby affects the applicability of the Family Advocacy Program.

The clearest case of a "voluntary self-referral" is when only the offender and victim are aware of the abuse prior to disclosure. *Id.* ¶ 9(b)(9)(c). There are cases in which self-referral, in the strictest sense, cannot be established, such as a member coming forward following a spouse's discovery of the abuse. *Id.* Consideration should be given to the "voluntary" nature of the disclosure when determining whether or not a person is a "voluntary self-referral." *Id.*

When the lower court changed its initial finding concerning Petitioner's "voluntary self-referral it established a foundation for determining that the Marine Corps Order did not apply to Petitioner. In doing so the lower court ignored all of the evidence presented at trial as to Petitioner's rehabilitative potential, proven performance, acceptance of responsibility, and willingness to change. In finding that Petitioner was no longer a "voluntary self-referral" the Navy-Marine Corps Court of Military Review relied upon "hindsight." *Bell*, 39 M.J. at 687. Unfortunately the "hindsight" the lower court relied upon to make this new determination was based upon the

assumption that once abuse has been revealed there cannot be a "voluntary self-referral." This determination and assumption is defective as it effectively eliminates all individuals from ever being a "voluntary self-referral."

It is unreasonable to assume or require an individual to proceed directly to a counseling or treatment center as their very first stop on the road to rehabilitation. Rather, the situation is almost certainly going to be that the abuse is reported to a family member, friend, or other trusted individual (in Petitioner's case, his wife was the first person he turned to) as a means for seeking advice, help, and support. It is reasonable for a person to be considered a "voluntary self-referral," after having sought the advice of a trusted individual, and asking for help by coming forward and seeking the assistance of professionals. To the converse, an involuntary referral would seem to be one who is being forced to undergo a rehabilitative program instead of seeking out a program on his own.

The lower court's decision does not uphold the purpose and policy created by the Marine Corps order. The decision undermines due process by allowing the government to create a ruse by forming a system that individuals will rely upon for assistance, but in which the end result is a cleverly disguised method to encourage and assist prosecution instead of the counseling, assistance, and rehabilitation envisioned in the order.

Petitioner should have been allowed to participate in the Family Advocacy Program, a program which serves both societal and personal interests, instead of being prosecuted for his actions. The Marine Corps created an avenue that was an alternative to prosecution, an avenue that was relied upon by Petitioner and ignored by the Marine Corps.

CONCLUSION

The United States Marine Corps created specific due process rights within its orders and regulations so child sex abuse offenders could seek rehabilitative assistance instead of being prosecuted for such actions. This due process right was established to "break the cycle of child and spouse abuse through identification and treatment." MCO 1752.3a at ¶ 4(c). As Justice Ginsburg has stated, "... men and women in the Armed Forces do not leave constitutional safeguards and judicial protection behind when they enter military service." *United States v. Weiss*, 114 S.Ct. 752, 769 (1994) (Ginsburg R., concurring). Petitioner detrimentally relied upon the Marine Corps Order and the Commandant's White Letter and was denied his right to due process as guaranteed him under the Fifth Amendment to the Constitution. This Court should address whether Petitioner's right to due process was violated.

Respectfully Submitted,

JOHN FRANCIS HAVRANEK
Captain, U.S. Marine Corps
Counsel of Record

PHILIP LAWRENCE SUNDEL
Lieutenant, Judge Advocate
General's Corps
U.S. Naval Reserve

NAVY-MARINE CORPS APPELLATE
DEFENSE DIVISION
Washington Navy Yard
Washington, D.C. 20374-1111
(202) 433-4161

APPENDICES

APENEDIX A

United States Court of Appeals for the Armed Forces

USCMA Dkt. No.63164/MC
CMR Dkt. No. 89-1067

UNITED STATES, APPELLEE

v.

JAMES C. BELL (420 92 2335), APPELLANT

On consideration of the petition for grant of review of the decision of the United States Navy-Marine Corps Court of Military Review, in light of *United States v. Corcoran*, 40 MJ 478 (CMA 1994), it is by the Court this 15th day of December, 1994,

ORDERED:

That said petition is hereby granted on Issue I raised by appellate defense counsel; and

That the decision of the United States Navy-Marine Corps Court of Military Review is affirmed.

For the Court,

/s/ John A. Cutts, III
Duputy Clerk of the Court

cc: The Judge Advocate General of the Navy
Appellate Defense Counsel (SHELDON)
Appellate Government Counsel (HERLIHY)

APPENDIX B

DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
200 STOVAL STREET
ALEXANDRIA, VA 22332-2400

IN THE U.S. NAVY-MARINE CORPS
COURT OF MILITARY REVIEW

BEFORE

R.A. JONES ALBERT A. REED
T.A. LAWRENCE

UNITED STATES

V.

JAMES C. BELL, 420 92 2335
Staff Sergeant, (E-6), U.S. Marine Corps

NMCM 89 01067 Decided 10 November 1993

Sentence adjudged 17 November 1988. Military Judge: H.R. Sims. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 2d Marine Aircraft Wing, FMF, Atlantic, Marine Corps Air Station, Cherry Point, NC 28533-6001.

LT DAVID P. SHELDON, JAGC, USNR, Appellate Defense Counsel.
LT DAVID K. HERLIHY, JAGC, USNR, Appellate Government Counsel.

JONES, Senior Judge:

Appellant was tried by general court-martial, military judge sitting alone, on 17 November 1988. Pursuant to his pleas, he was convicted of two specifications of indecent acts upon a child under 16 years of age, in violation of Article 134, Uniform Code of Military Justice (UCMJ). He was sentenced to three years' confinement, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the sentence and, except for the dishonorable discharge, ordered it executed, but suspended execution of confinement in excess of 10 months in accordance with the pretrial agreement.

On review by this Court, a majority of the panel approved the conviction but affirmed only so much of the sentence as provides for a bad-conduct discharge, the confinement (as suspended in part by the convening authority), and the reduction to pay grade E-1. *United States v. Bell*, 28 M.J. 1062 (N.M.C.M.R. 1989). The Court of Military Appeals granted review on three issues specified by that Court[1]. *United States v. Bell*, 29 M.J.

---

[1] I. Whether the military judge erred to the substantial prejudice of the appellant when he admitted the testimony of appellant's commanding officer that appellant could not continue to serve as a noncommissioned officer.

II. Whether the Navy-Marine Corps Court of Military Review erred when it concluded that appellant's separation from the service by reason of the sentence of a court-martial was correct in law and fact, when Marine Corps policy provided that Marines involved in sexual abuse who confessed such abuse prior to detection would be rehabilitated within the service and returned to duty. See

442 (C.M.A. 1989). The order granting review was subsequently modified by an order dated 21 May 1990, in which the Court of Military Appeals disposed of the first specified issue in favor of the Government, and remanded the case to this Court for further review.

Noting that this Court's original majority opinion of 26 June 1989 did not specifically address the concerns expressed in the dissent that "Marine Corps policy provides for members of the Corps, who are involved in sexual abuse and who confess such abuse prior to detection, to be rehabilitated within the service and returned to duty," the Court of Military Appeals set aside this Court's decision on 21 March 1990, and returned the record. were to exercise our factfinding powers under Article 66, UCMJ, to re-examine the facts and circumstances of this case and determine the following questions posed by our senior court:

> WHETHER APPELLANT'S CASE SHOULD HAVE BEEN TREATED UNDER THE TERMS OF MARINE CORPS ORDER 1752.3A AND THE POLICY STATEMENT OF THE COMMANDANT OF THE MARINE CORPS IN HIS WHITE LETTER NO. 2-88 OF FEBRUARY 26, 1988.

United States v. Dunks, 1 M.J. 254 (C.M.A. 1976).

III. Whether the Navy-Marine Corps Court of Military Review erred as a matter of law when it affirmed an unsuspended bad-conduct discharge as a part of appellant's sentence. See United States v. Clarke, 16 M.J. 239, 243 (C.M.A. 1983) (Everett, C.J., concurring).

> WHETHER APPELLANT MEETS THE CRITERIA FOR TREATMENT CONTEMPLATED BY THE COMMANDANT'S POLICY AND, IF SO, HOW THAT POLICY WOULD APPLY TO THE FACTS OF THIS CASE.
>
> WHETHER, IN THE EVENT APPELLANT DOES NOT MEET THE CRITERIA FOR CONSIDERATION UNDER MARINE CORPS POLICY, THE RECORD OF TRIAL SHOULD BE REMANDED TO THE CONVENING AUTHORITY FOR FURTHER CONSIDERATION IN LIGHT OF THE FACT THAT "THE . . . SENTENCE HE HAS APPROVED IS INAPPROPRIATE" AND WITH DIRECTIONS THAT NO SENTENCE BE APPROVED IF IT INCLUDES PUNISHMENT GREATER THAN A DISCHARGE SUSPENDED UNDER PROPER CONDITIONS. *See United States v. Clark*, 16 M.J. 239, 243 (C.M.A. 1983) (Everett, C.J., concurring).

We, in turn, set aside the convening authority's action with the following directive:

> The record of trial is returned . . . to the convening authority who shall obtain a new staff judge advocate's recommendation, give an opportunity to defense counsel to respond to that recommendation pursuant to R.C.M. 1106(f), and then review the record of trial in light of Marine Corps Order 1752.3A and the Commandant's White Letter No. 2-88. In taking his de novo

> action pursuant to Article 60, UCMJ, the convening authority shall articulate the reasons the appellant does or does not fall under the terms of the Order and the White Letter. Additionally, if the convening authority determines that the appellant meets the criteria of the Order and the White Letter, and if he approves the punitive discharge adjudged, he shall articulate why under the terms of the Order and Letter appellant should not be retained and treated. If the convening authority considers facts, including the affidavits from those involved, not contained in the record of trial, he shall identify those facts and attach the source of the facts to the record of trial.

The convening authority has taken his action anew and the record is before us again pursuant to our Article 66, UCMJ, responsibilities.

I.

At the outset, we restate what we held before as part of Senior Judge Albertson's unpublished majority opinion in earlier setting aside the convening authority's action:

> We conclude, first, that appellant raised no bar to prosecution at trial or on review. Second, the Marine Corps policy set forth in Marine Corps Order 1752.3A does not prohibit prosecution under the UCMJ of child sexual molestation or any other familial offense revealed through a described voluntary self-referral. Third, the Commandant's White Letter No. 2-88 does not prohibit the prosecution under the UCMJ of child

> molestation or any other familial offense revealed through a described voluntary self-referral. Fourth, neither the policy nor the letter promises no prosecution if voluntary self-referral occurs. We therefore need not address the bar to prosecution issue that was present in *United States v. Spence*, 29 M.J. 630 (A.C.M.R. 1989) and the somewhat analogous case of *Cooke v. Orser*, 12 M.J. 335 (C.M.A. 1982). Those conclusions, however, are only adverse to appellant because the record does not show that appellant was promised he would not be prosecuted; . . . therefore whether his conduct should be treated as an administrative matter under the provisions of MCO 1752.3A and the Commandant's White Letter No. 2-88 or as a criminal offense for prosecution under the UCMJ is solely a matter within the discretion of the convening authority. *Cf. United States v. Woods*, 26 M.J. 372 (C.M.A)[2].

We also specifically stated:

> Unlike the appellant in Spence and the other analogous bar to prosecution cases, the issue in this case involves only the appropriateness of the sentence. We decide only that issue because the record does not contain facts sufficient to resolve any other issue and to raise the issue for the first time at this level is unacceptable, particularly in a case involving provident pleas of guilty. *See*

---

[2] *United States v. Bell*, No. 89-1067R, slip op. at 4 (N.M.C.M.R. 31 July 1991).

generally United States v. Bartell, 32 M.J. 295 (C.M.A. 1991); Rule for Court-Martial 910(j), MCM[3].

II.

Appellant avers in his first assignment of error,

THE CONVENING AUTHORITY ERRONEOUSLY CONCLUDED THAT APPELLANT DID NOT FALL WITHIN THE APPLICABLE MARINE CORPS ORDER.

With the benefit of hindsight, supplied by the exhibits to the criminal investigation and to the Article 32, UCMJ, pretrial investigation, we find that appellant did not "voluntarily self-refer" for treatment within the meaning of Marine Corps Order 1752.3A, as we previously had been led to believe by reference to the record of appellant's court-martial alone. Appellant's spouse's report of her daughters' sexual abuse by appellant to first, county Department of Human Resources officials; second, to criminal investigators of the Air Force Office of Special Investigations; and third, to special agents of the Naval Investigative Service on 18 April 1988 (Investigative Exhibit 7) effectively precluded his "voluntarily" referring himself for help within the meaning of the Order. Such a conclusion is certain where it is clear from his spouse's statements at the Mental Health Clinic on 18 April and to NIS on 18 May 1988 that she had previously informed appellant that she had made an official complaint. Appellant was

---

[3] *Id.* n.1.

aware that a criminal investigation was in progress at least a week before he appeared at the Family Services Center. (Exhibit 2 to Attachment 2 (NIS report) of 27 Sep 1991 SJA Recommendation).

We also agree with the government's secondary position that even if appellant's acts could be construed as constituting a "voluntary self-referral," he would not necessarily qualify for special consideration under the terms of the Marine Corps Order or the Commandant's White Letter. The determination that a Marine has "self-referred" is only the threshold step in determining the course of action to be pursued -- treatment or disciplinary action, or a combination thereof. Paragraph (5)(c) provides, "in cases where there is good rehabilitation potential and the Marine has a record of positive performance, the preferred course of action is counseling or mandated rehabilitation and appropriate disciplinary accountability."

Paragraph (4)(e) notes that commanders "should be guided in their determinations by the following factors:

> (1) the Marine's demonstrated record of performance,
>
> (2) potential for future service,
>
> (3) motivation to change the behavior, and
>
> (4) the evaluation by competent counselors or medical personnel that the Marine is a good candidate for successful treatment."

On the other hand, paragraph (4)(f) provides that "commanders shall apply disciplinary or administrative sanctions for acts of abuse, when considered appropriate. Disciplinary or administrative action is most appropriate when:

> (1) offenders fail to acknowledge or assume responsibility for their behavior,
>
> (2) behavior of offenders is compulsive, repeated, and represents a specific danger,
>
> (3) the victim has suffered serious injury, or
> (4) there is sufficient evidence for conviction and testifying in court is in the best interest of the victim. Commanders should carefully consider the impact of any punishment on the victim and the entire family."

In his de novo action, the convening authority relied upon a number of these factors. There was at least some evidence that appellant had initially indicated to his wife that once his misconduct had been exposed, he no longer needed help. Appellant was not forthcoming initially as to the full nature and more aggravated extent of his actions, denying (during his meeting with a counselor at the Family Services Center) his digital penetration of his daughter's vagina. Additionally, and self-evidence of "repeated" conduct, is the fact that appellant admitted to his sexual abuse of both of his older daughters.

Accordingly, we conclude, (1) that appellant did not voluntarily self-refer and thus the disposition of his case

did not fall within the alternative avenues available under the Marine Corps Order, and (2) that even if it did, the convening authority was well within his reasoned discretion in taking the course of action he did. Based upon our review of the facts of this case, we believe it would be inappropriate to return this case to the convening authority for his suspension of the punitive discharge. *See United States v. Clark*, 16 M.J. 239, 243 (C.M.A. 1983) (Everett, C.J. concurring). Thus, we answer the third of our senior court's questions in the negative.

The remaining assignments of error are without merit[4]. *United States v. Graf*, 35 M.J. 450 (C.M.A. 1992); *United States v. Weiss*, 36 M.J. 224 (C.M.A. 1992).

---

[4] II. THE COURT-MARTIAL DID NOT HAVE JURISDICTION BECAUSE THE MILITARY JUDGE WAS NOT APPOINTED TO A FIXED TERM OF OFFICE. (CITATION OMITTED.)

III. THIS COURT HAS NO JURISDICTION BECAUSE THIS COURT'S JUDGES WERE NOT APPOINTED TO A FIXED TERM OF OFFICE. (CITATION OMITTED.)

IV. APPELLANT'S COURT-MARTIAL LACKED JURISDICTION BECAUSE THE MILITARY JUDGE WAS DESIGNATED IN VIOLATION OF THE APPOINTMENTS CLAUSE OF THE CONSTITUTION. (CITATION OMITTED.)

V. BECAUSE THIS COURT'S JUDGES WERE APPOINTED IN VIOLATION OF THE APPOINTMENTS CLAUSE, THIS COURT HAS NO POWER TO REVIEW APPELLANT'S CASE. (CITATION OMITTED.)

Finally, we note that the staff judge advocate recommended that the sentence, as modified by the initial decision of this Court, be executed, except for the bad-conduct discharge. Notwithstanding that advice, the convening authority's action purports to approve the dishonorable discharge adjudged. We believe that the determination of our senior court to set aside our initial opinion affirming a bad-conduct, instead of a dishonorable, discharge, should not erase the benefit appellant has gained on appeal.

Accordingly, the findings of guilty and only so much of the sentence, as approved on review below, as provides for three years' confinement, in part suspended, reduction to pay grade E-1, and a bad-conduct discharge are affirmed.

R.A. JONES

Senior Judge REED and Judge LAWRENCE concur.

ALBERT A. REED

T.A. LAWRENCE

APPENDIX C

DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
200 STOVAL STREET
ALEXANDRIA, VA 22332-2400

IN THE U.S. NAVY-MARINE CORPS
COURT OF MILITARY REVIEW

BEFORE

E. M. ALBERTSON R. A. JONES
T. A. LAWRENCE

UNITED STATES

V.

JAMES C. BELL, 420 92 2335
Staff Sergeant, (E-6), U.S. Marine Corps

NMCM 89 01067 Decided July 31, 1991

Sentence adjudged November 17, 1988. Military Judge: H R Sims. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 2d Marine Aircraft Wing, FMF, Atlantic, Marine Corps Air Station, Cherry Point, NC 28533-6001.

LT WADE W. PARRISH, JAGC, USNR, Appellate Defense Counsel.

LCDR J. RICHARD CHEMA, JAGC, USN, Appellate

Government Counsel.

ALBERTSON, Senior Judge:

The U.S. Court of Military Appeals, 30 M.J. 168 (C.M.A. 1990), set aside our decision in this case, 28 M.J. 1062 (N.M.C.M.R. 1989), and remanded it to us for proceedings in accordance with Article 66, Uniform Code of Military Justice (UCMJ) with specific directions to re-examine, through our fact-finding powers, the facts and circumstances of this case and determine:

I. WHETHER APPELLANT'S CASE SHOULD HAVE BEEN TREATED UNDER THE TERMS OF MARINE CORPS ORDER 1752.3A AND THE POLICY STATEMENT OF THE COMMANDANT OF THE MARINE CORPS IN HIS WHITE LETTER NO. 2-88 OF FEBRUARY 26, 1988.

II. WHETHER APPELLANT MEETS THE CRITERIA FOR TREATMENT CONTEMPLATED BY THE COMMANDANT'S POLICY AND, IF SO, HOW THAT POLICY WOULD APPLY TO THE FACTS OF THIS CASE.

III. WHETHER, IN THE EVENT APPELLANT DOES NOT MEET THE CRITERIA FOR CONSIDERATION UNDER MARINE CORPS POLICY, THE RECORD OF TRIAL SHOULD BE REMANDED TO THE CONVENING AUTHORITY FOR FURTHER CONSIDERATION IN LIGHT OF THE FACT THAT "THE . . . SENTENCE HE HAS

APPROVED IS INAPPROPRIATE" AND WITH DIRECTIONS THAT NO SENTENCE BE APPROVED IF IT INCLUDES PUNISHMENT GREATER THAN A DISCHARGE SUSPENDED UNDER PROPER CONDITIONS.

The Commandant's White Letter incorporated Marine Corps Order (MCO) 1752.3A when it mandated that commanders become familiar with the "applicable law and regulation" governing child abuse and the procedures to be followed by commanders when such identification occurs. We have reviewed the contents of MCO 1752.3A and the Commandant's White Letter No. 2-88 and arrive at the following analysis.

A. MCO 1752.3A

MCO 1752.3A, is entitled "Marine Corps Family Advocacy Program." The order publishes "policies, procedures, and guidance for the operation of the Marine Corps Family Advocacy Program" and is intended "to inform commanders of their roles and responsibilities" in that program. Its principal concern is the prevention and identification of child neglect and child abuse for the protection of dependent children. Specifically, the order condemns "acts of child neglect, child abuse, and spouse abuse" because they "are incompatible with the high standards of professional and personal discipline of members of the U.S. Marine Corps." Its principal objective is for commanders to prevent, evaluate, identify, intervene, treat, rehabilitate, follow up, and report child and spouse abuse. The treatment and rehabilitation of Marines who are proven performers are two methods the commander is directed to use in meeting his responsibility of attaining its principal

objective in individual cases. To that end, the order provides specific guidance for the commander to identify a proven performer with potential for treatment and rehabilitation. Paragraph 4e and f, MCO 1752.3A. The commander and individual Marine have a mutual responsibility under the program established by the order as a whole and particularly under paragraphs 4e, 6e, 7b, 9b(5)(c) and (d), and 9b(9)(a) and (i).

Our review of the Marine Corps Order leaves us uncertain as to its relationship to military justice proceedings. It appears to give the commander complete discretion, yet it also gives specific guidance as to how he is to exercise that discretion. Furthermore, it appears to give him three options: do nothing, take administrative action -- whatever that might entail -- or take disciplinary action. The overall sense of the order, however, is that if the Marine abuser meets the criteria set forth for the commander to use in exercising his discretion in determining which option would be appropriate, the Marine should be retained on active duty to meet his responsibilities under the order. We are also uncertain as to what consequences, if any, obtain if a commander ignores the order, makes some arbitrary decision during his application of the order to the facts, or follows the order precisely but fails to retain the Marine (even by means of suspending any punitive discharge adjudged with specific conditions for participating in treatment and rehabilitation programs) despite the fact the Marine is a good performer who self-referred to appropriate authorities and meets the other criteria of the order, including the potential for successful treatment and rehabilitation. Because the Marine child abuser's successful treatment and rehabilitation often is an integral part of the treatment

and rehabilitation of the victim and the victim's family, he derives a benefit from the order. The convening authority's consideration or non-consideration of the order is critical in determining whether the Marine is entitled to any benefit from it under the law.

B. WHITE LETTER NO. 2-88

The Commandant's White Letter No. 2-88, dated 26 February 1988, is entitled "Command Support for Families in which Child Sexual Abuse Has Occurred." The letter is intended to inform commanders of the growing problem of child sexual abuse and that the time has come for them "to recognize that such behavior occurs within Marine families and to take up the challenge of meeting the needs of such families." The entire thrust of the letter is directed at helping the victims and the families of victims "to ensure that the physical well-being of the child victim is protected and that trauma to that victim and the other family members is minimized." The letter encourages commanders of identified Marine child abusers to be "sensitive to the impact of their actions upon the family." The letter urges commanders to consider a non-criminal response when that would be in the best interests of the family. We find the letter on its face is not intended to protect the personal liberties or interests of the appellant. Although the policy statement appears instead to be aimed at command support for child abuse victims and offers suggestions as to how to provide that support, its incorporation of the Marine Corps Order bears on whether the child abuser should be prosecuted. In fact, its sole reference to action that should be taken regarding the child abuser encourages consideration of whether it will enhance the interests of the victim's family. *See*

United States v. Harrison, 19 U.S.C.M.A. 171, 41 C.M.R. 179 (1970). As a result, when the child abuser is a member of the victim's family, disposition of his case affects the best interests of the family.

C. THE APPLICABLE LAW

The Supreme Court has held that the government must abide by its own regulations when "the underlying purpose of such regulations is the protection of personal liberties or interests." *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681 (1954); *United States v. Russo*, 1 M.J. 134, 135 (C.M.A. 1975); *United States v. Anderson*, 12 M.J. 527 (N.M.C.M.R. 1981). It has also held that regulations that are integral to Congressional legislation and have penal ramifications must be strictly construed. *United States v. Mersky*, 361 U.S. 431, 4 L.Ed.2d 423, 80 S.Ct. 459 (1960). Whether the Marine Corps Order has penal ramifications because it is a regulation that implements departmental policy that is based on congressional legislation, see Department of Defense (DOD) Directive 6400.1, is not a question we address now; but the legal principle exists such that the facts we obtain from this decision may serve to resolve that issue.

D. INITIAL CONCLUSIONS

Based on the foregoing, we conclude, first, that appellant raised no bar to prosecution at trial or on review. Second, the Marine Corps policy set forth in Marine Corps Order 1752.3A does not prohibit prosecution under the UCMJ of child sexual molestation or any other familial offense revealed through a described voluntary self-referral. Third, the

Commandant's White Letter No. 2-88 does not prohibit the prosecution under the UCMJ of child sexual molestation or any other familial offense revealed through a described voluntary self-referral. Fourth, neither the policy nor the letter promise no prosecution if voluntary self-referral occurs. We therefore need not address the bar to prosecution issue that was present in *United States v. Spence*, 29 M.J. 630 (A.C.M.R. 1989) and the somewhat analogous case of Cooke v. Orser, 12 M.J. 335 (C.M.A. 1982). Those conclusions, however, are only adverse to appellant because the record does not show that appellant was promised he would not be prosecuted and therefore whether his conduct should be treated as an administrative matter under the provisions of MCO 1752.3A and the Commandant's White Letter No. 2-88 or as a criminal offense for prosecution under the UCMJ is solely a matter within the discretion of the convening authority. *Cf. United States v. Woods*, 26 M.J. 372 (C.M.A. 1988). Fifth, the Commandant's White Letter incorporates MCO 1752.3A by requiring that commanders become familiar with the "applicable law and regulation" governing child abuse and the applicable procedures for commanders when such identification occurs. Only where a Marine has self-referred to authorities under a reasonable expectation that the government will not prosecute him for the offenses he may reveal, will this Court consider holding the Government to its word to abide by the agreement upon which the accused reasonably relied to his detriment. *See Spence*[1].

---

[1] Like the Air Force Court of Military Review in Spence, the Navy and Marine Corps as a result of policy promulgated from highest headquarters has tried to inform naval personnel of the problems of child abuse and to encourage the reporting and treating of child abuse, including

The record contains no facts that show that the convening authority considered the policy set forth in the Marine Corps Order and the Commandant's White Letter when he took his action. We are required, however, by the remand to exercise our fact-finding powers to find facts that will provide answers to questions of law raised at the appellate level.

Accordingly, we set aside the convening authority's action. The record of trial is returned to the Judge Advocate General for remand to the convening authority who shall obtain a new staff judge advocate's recommendation, give an opportunity to defense counsel to respond to that recommendation pursuant to R.C.M. 1106(f), and then review the record of trial in light of Marine Corps Order 1752.3A and the Commandant's White Letter No. 2-88. In taking his de novo action pursuant to Article 60, UCMJ, the convening authority shall articulate the reasons the appellant does or does not fall under the terms of the Order and the White Letter. Additionally, if the convening authority determines that the appellant meets the criteria of the Order and the White Letter, and if he approves the punitive discharge

---

encouraging voluntary self-referral by servicemembers who are abusers. Unlike the promises made in *Cooke v. Orser*, *United States v. Churnovic*, 22 M.J. 401 (C.M.A. 1986), and *United States v. Spence*, the encouragement for self-referral reflected in MCO 1752.3A and Commandant's White Letter No. 2-88 comes from the highest Marine Corps authorities and unless carefully and fully explained can be reasonably misinterpreted as to the consequences of self-referral. Unlike the appellant in Spence and the other analogous bar to prosecution cases, the issue in this case involves only the appropriateness of the sentence. We decide only that issue because the record does not contain facts sufficient to resolve any other issue and to raise the issue for the first time at this level is unacceptable, particularly in a case involving provident pleas of guilty. *See generally United States v. Bartell*, 32 M.J. 295 (C.M.A. 1991); Rule for Court-Martial 901(j), MCM.

adjudged, he shall articulate why under the terms of the Order and Letter appellant should not be retained and treated. If the convening authority considers facts, including affidavits from those involved, not contained in the record of trial, he shall identify those facts and attach the source of the facts to the record of trial. The convening authority shall ensure compliance with Rule for Courts-Martial 1107(h), Manual for Courts-Martial, United States, 1984. Upon completion of the convening authority's action, the record of trial shall be returned to this Court for further review in accordance with the mandate of the U.S. Court of Military Appeals.

APPENDIX D

UNITED STATES COURT OF MILITARY APPEALS

No. 63164/MC

NMCM 89 1067

UNITED STATES, *appellee,*

v.

James C. Bell, *appellant.*

Decided June 26, 1989

APPEALS -- SUMMARY DISPOSITIONS

On further consideration of the granted issue (29 MJ 442), we have reached the following conclusions:

1. At trial, the Government established a sufficient and rational basis for calling appellant's commanding officer to testify on the rehabilitative potential of a serviceperson assigned to serve as a member of his command. *See United States v. Ohrt*, 28 MJ 301 (CMA 1989). Thus, the military judge did not err to the substantial prejudice of appellant by admitting the officer's statement.

2. The Court of Military Review concluded that, in light of his voluntary efforts at rehabilitation, appellant's separation from the service with a less severe discharge than that imposed by sentence of the court-martial was correct in law and fact. The dissent opined that Marine Corps policy provided for members of the Corps, who are involved in sexual abuse and who confess such abuse prior to detection, to be rehabilitated within the service and returned to duty. The majority opinion below does not specifically address the concerns expressed in the dissent.

Accordingly, it is ordered that the decision of the United States Navy-Marine Corps Court of Military Review is set aside. The record of trial is returned to the Judge Advocate General of the Navy for resubmission to that court for further proceedings in accordance with Article 66, Uniform Code of Military Justice, 10 USC @ 866. Through its factfinding powers, the court shall re-examine the facts and circumstances of this case and determine:

I. Whether appellant's case should have been treated under the terms of Marine Corps Order 1752.3A and the policy statement of the Commandant of the Marine Corps in his White Letter No. 2-88 of February 26, 1988.

II. Whether appellant meets the criteria for treatment contemplated by the Commandant's policy and, if so, how that policy would apply to the facts of this case.

III. Whether, in the event appellant does not meet the criteria for consideration under Marine Corps policy, the record of trial should be remanded to the convening authority for further consideration in light of the fact that "the . . . sentence he has approved is inappropriate" and with directions that no sentence be approved if it includes punishment greater than a discharge suspended under proper conditions.

See United States v. Clark, 16 MJ 239, 243 (CMA 1983) (EVERETT, C. J., concurring).

Upon completion of this reconsideration by the court below, Article 67(b)(3), Uniform Code of Military Justice, 10 USC @ 867(b)(3), shall apply.

APPENDIX E

UNITED STATES COURT OF MILITARY APPEALS

No. 63164/MC

NMCM 89 1067

UNITED STATES, *appellee,*

v.

James C. Bell, *appellant.*

Decided November 27, 1989

ORDER GRANTING PETITION FOR REVIEW

Granted on the following issues specified by the Court:

I. Whether the military judge erred to the substantial prejudice of the appellant when he admitted the testimony of appellant's commanding officer that appellant could not continue to serve as a noncommissioned officer.

II. Whether the Navy-Marine Corps Court of Military Review erred when it concluded that appellant's separation from the service by reason of the sentence of a court-martial was correct in

law and fact, when Marine Corps policy provided that marines involved in sexual abuse who confessed such abuse prior to detection would be rehabilitated within the service and returned to duty. *See United States v. Dunks*, 1 MJ 254 (CMA 1976).

III. Whether the Navy-Marine Corps Court of Military Review erred as a matter of law when it affirmed an unsuspended bad-conduct discharge as a part of appellant's sentence. *See United States v. Clarke*, 16 MJ 239, 243 (CMA 1983) (EVERETT, C.J., concurring).

APPENDIX F

DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
200 STOVAL STREET
ALEXANDRIA, VA 22332-2400

IN THE U.S. NAVY-MARINE CORPS
COURT OF MILITARY REVIEW

BEFORE

E. M. BYRNE E. M. ALBERTSON
J. J. JONES

UNITED STATES

V.

JAMES C. BELL, 420 92 2335
Staff Sergeant, (E-6), U.S. Marine Corps

NMCM 89 01067 Decided June 26, 1989

LT WADE W. PARRISH, JAGC, USNR, Appellate Defense Counsel

CAPT WENDELL A. KJOS, JAGC, USN, Appellate Government Counsel

PER CURIAM:

The findings of guilty as approved on review below are affirmed.

Based upon appellant's voluntary self-referral to the Family Services Center, subsequent counseling and treatment through civilian sources at his own expense, and in light of other child sexual abuse cases we have reviewed, we find a dishonorable discharge to be an inappropriate punishment in this case. Accordingly, only so much of the sentence as provides for three years confinement, as suspended in part by the convening authority, reduction to pay grade E-1, and a bad-conduct discharge is affirmed.

ALBERTSON, Judge (concurring in part, dissenting in part):

I concur with respect to the findings but I dissent with respect to affirmance of the sentence, as modified, because I find that a sentence which includes an unsuspended punitive discharge is inappropriate under the particular circumstances of this case. Since this Court cannot suspend punitive discharges, I am further constrained to find a punitive discharge inappropriate. *Cf. United States v. Lucas*, M.J. , ACM 27596 (AFCMR 22 May 1989). I find it essential to my own peace of mind to explain my concern.

Appellant was convicted, in accordance with his pleas of guilty, of two specifications of indecent acts upon his two natural daughters (touching the buttocks of one daughter and a touching and slight finger insertion with the other) in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. @ 924. The military judge sentenced him to three years confinement, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the sentence but, pursuant to the terms of a pretrial

agreement, suspended all confinement in excess of ten months for a period of one year from the date the sentence was adjudged.

Prosecution of the appellant's criminal acts and his resulting conviction for those acts were made possible by the appellant himself when he revealed his conduct to his wife during marital conversations involving their estranged relationship. They, together with their two daughters, went to Family Services Center for marital counseling. During this counseling session, appellant admitted his criminal acts and asked for treatment, producing, in support of his request, WHITE LETTER No. 2-88 of 26 February 1988 (Subj: COMMAND SUPPORT FOR FAMILIES IN WHICH CHILD SEXUAL ABUSE HAS OCCURRED) issued by the Commandant of the Marine Corps. The Family Services counselor advised appellant of the various resources available to him for obtaining treatment. (The record does not reveal how Marine Corps authorities became aware of the appellant's criminal acts in order to initiate court-martial proceedings against him.) Appellant followed the advice of the Family Services counselor and began psychotherapy counseling and treatment, at his own expense, with the Savannah Psychotherapy Center, and Tidelands Community Mental Health Center under the umbrella of the Chatham County Sexual Abuse Treatment Coalition (hereinafter Savannah). Appellant was required to resort to civilian resources at his own expense because the Marine Corps and Navy did not have the capability of providing such services locally. All reports from the clinical psychologist and clinical social worker at Savannah indicated, at the time of his court-martial, that he was progressing satisfactorily in his treatment program, which included at that time

completion of two individual/psychotherapy sessions and fourteen group psychotherapy sessions. Additionally, the Family Services counselor testified at trial that she believed these two incidents were isolated incidents; that he had been cooperative throughout the time since he revealed his conduct; that he was remorseful about his conduct and sincere in his desire for treatment; that he was rightfully concerned about counseling for his daughters which his unstable wife was not interested in providing; that he would be a much more positive influence on the children than his wife; and, that he was on his way to rehabilitation.

I do not, in any fashion, condone the conduct of appellant nor think that he should not be held accountable for such conduct; however, since the Department of Defense, the Department of the Navy and, specifically, the Marine Corps have recognized and assumed responsibility for dealing with the medical and social aspects of the problem of child maltreatment amongst its members, I believe that responsibility, as set forth in Marine Corps Order 1752.3A dated 6 April 1987, must be accepted within the terms of the announced policy, *e.g.*, "prevention, evaluation, identification, intervention, treatment, follow-up, and reporting." Marine Corps policy requires commanders to ensure that "local military medical treatment facilities and [family service centers], if available, maintain a cooperative relationship to maximize the delivery of services to dysfunctional families." Additionally, Marine Corps policy states:

> e. Commanders can break the cycle of child and spouse abuse through identification and treatment. They should encourage Marines who

are proven performers to enter treatment or rehabilitation programs. Commanders should be guided in their determinations by the following factors:

(1) the Marine's demonstrated record of performance,

(2) potential for future service,

(3) motivation to change the behavior, and

(4) the evaluation by competent counselors or medicalpersonnel that the Marine is a good candidate for successful treatment.

f. Commanders shall apply disciplinary or administrative sanctions for acts of abuse, when considered appropriate. Disciplinary or administrative action is most appropriate when:

(1) offenders fail to acknowledge or assume responsibility for their behavior,

(2) behavior of offenders is compulsive, repeated, and represents a specific danger,

(3) the victim has suffered serious injury, or

> (4) there is sufficient evidence for conviction and testifying in court is in the best interest of the victim. Commanders should carefully consider the impact of any punishment on the victim and the entire family.

The objective of this Marine Corps policy, as enunciated in paragraph 5, is to stop abuse within families.

> . . . To that end, the program provides a means for the commander to:

a. . . .

(1) Enhance unit readiness by operating programs to restore families suffering from abuse to a healthy state.

. . . .

b. . . .

(1) Help Marines in dealing with family abuse.

(2) Provide rehabilitative counseling to family members involved in abuse.

. . . .

The Marine Corps Order also sets forth program guidance and defines and explains the four stages of prevention, intervention, rehabilitation and treatment. As to the latter, the order states, in part:

(5) Rehabilitation/Treatment

(a) The goals of rehabilitation are to prevent a recurrence of abuse, repair any lasting physical or psychological damage resulting from the abuse, and return the family to a functional state. . . .

(b) Some problems, by nature of their severity, long duration, or frequent recurrence are not amenable to treatment. In such cases, seek the advice and help of competent mental health professionals through nearby military medical treatment facilities, when feasible, or through local social service agencies. Administrative separation from the Marine Corps should be considered.

(c) In cases where there is good rehabilitation potential and the Marine has a record of positive performance, the preferred course of action is counseling or mandated rehabilitation and appropriate disciplinary accountability.

(d) When the Marine is retained and placed in a counseling/rehabilitation program, cooperation and participation with the counseling regimen is essential. Failure to cooperate, progress, satisfactorily complete the prescribed treatment, or repetition of the offense will result in disciplinary or administrative

action which could include separation from the service.

Finally, a policy with regard to Marines who voluntarily self-refer themselves for help is described within the Marine Corps Order:

(9) Voluntary Self-Referral

(a) Marines and family members who are potential or actual offenders should be encouraged to seek help at the earliest opportunity. Any Marine, family member, or overseas civilian employee may obtain treatment or aid for a child or spouse problem by means of self-referral. Military members who seek treatment or help for domestic violence problems may initiate the evaluation and intervention process by voluntarily disclosing the nature and extent of their problem to a qualified family advocacy or counseling personnel.

(b) Admission of child or spouse abuse by an offender is sufficient evidence to substantiate a case and requires notification of the member's commanding officer.

(c) Determination as to whether a voluntary self-referral has been made rests with the individual's commanding officer. The clearest case of self-referral occurs when only the offender and victim are aware of the abuse prior to the voluntary

disclosure. There are cases in which self-referral, in the strictest sense, cannot be established, such as a member coming forward following a spouse's discovery of child abuse. Consideration should be given for the essentially voluntary nature of this type of disclosure. Early resolution of this issue is required in order to prevent confusion as the case develops.

(d) Voluntary disclosures of child or spouse abuse made by a member to the proper family advocacy or counseling personnel will not be used against the member as the sole source of information upon which to base disciplinary action under the Uniform Code of Military Justice, nor as the sole basis for characterizing a discharge as "Other than Honorable" provided such information is disclosed by the member for the express purpose of obtaining help or treatment. This does not preclude administrative processing or reporting actions which must be taken in compliance with State law, nor is the member protected against possible civilian prosecution.

My examination of the record of trial reveals that appellant acted in reliance upon and in accordance with Marine Corps policy. At the time of his admissions to the sexual abuse of his two daughters he gave the Family Services counselor the Commandant's White Letter No. 2-8C of 26 February 1988, stated he knew "that what he had done was wrong and that he wanted help." Included

in the White Letter is the following statement: "Further, those involved in dealing with the Marine accused's offense must be sensitive to the impact of their actions upon the family. In this regard, when determining the course of action to be taken with respect to the offender, I urge you to consider the possibility of non-criminal responses."

For me the evidence contained in the record of trial indicates that appellant falls within the ambit of the above quoted provisions of the Marine Corps policy to treat, rehabilitate and retain: appellant voluntarily referred himself by admitting his misconduct, asked for treatment, and began a rehabilitation program at his own expense. Additionally, he successfully participated in the rehabilitation program for at least 14 weeks prior to his court-martial. Competent counselors reported him to have excellent potential for rehabilitation and therefore it could be concluded that he was a candidate for successful treatment. He was the stabilizing influence on his family and was motivated to change his behavior. According to a captain and a staff sergeant, who had known and worked with him for over a year, appellant performed his current duties "extremely well," and in an "excellent to outstanding manner." Appellant was an offender who acknowledged and assumed responsibility for his behavior; his behavior was not compulsive, repeated or represented a specific danger; the children had not suffered serious injury; and it is questionable that there was sufficient evidence for conviction, except for appellant's own admission. Nor was there a demonstration that testifying in court was to the best interest of the children since neither child testified. While his commanding officer, a lieutenant colonel, testified that appellant had no rehabilitative potential, he

based that opinion on the offenses for which the appellant had been convicted and with little interest, recognition and due consideration of the letters from the medical authorities evaluating appellant's treatment status. If the record of trial does not reflect the true state of appellant's case, as gleaned from the stipulated facts, then the Government must accept responsibility for failure to establish the appropriateness of the sentence it seeks to have us affirm.

In light of his record of successful voluntary participation in a treatment and rehabilitation program at his own initiative and expense, as well as his having a "record of positive performance" during his approximately 12 years of active duty, I have determined, pursuant to my Article 66(c), UCMJ, responsibilities, that an approved sentence that includes an unsuspended punitive discharge is an inappropriate sentence. I also believe that such a sentence, in appellant's particular case, is contrary to public policy as reflected in Marine Corps Order 1752.3A. Affirmance of the sentence as approved on review below, or as commuted on our review, will not encourage others with child sexual abuse problems to come forward and seek help through treatment and rehabilitation. Nor will it asssist commanders to encourage Marines to come forward for treatment. Neither is the commander's means of providing unit readiness by operating programs to restore families to a healthy state enhanced. If a Marine, particularly a career Marine, runs a substantial risk of being punitively discharged as well as being confined for a long period of time and deprived of the capability of providing financial support for the family as a result of forfeitures or reduction in pay grade, what Marine with a record of long and positive performance

of military duties would voluntarily refer himself for treatment and rehabilitation under the Marine Corps program? The consequences for his voluntary self-referral are perceptively as severe as if he had remained silent and risked being caught.

If the Marine Corps determines that it is no longer in the best interests of the Marine Corps to retain Marines who have voluntarily confessed to abusing their children or spouse despite the Marine's record of positive performance and potential for rehabilitation and successful treatment, then the policy established in Marine Corps Order 1752.3A will be modified or cancelled. Until the order is modified or cancelled, however, I believe we must abide by the guidelines of that order. Certainly, a convening authority must not abdicate his court-martial functions because of a policy set forth by a Marine Corps Order. *See United States v. Rivera*, 12 U.S.C.M.A. 507, 31 C.M.R. 93 (1961). On the other hand, this Court cannot put blinders on with regard to that policy when it served as the central factor to motivate appellant's pretrial and post-trial conduct and was the central point of appellant's sentencing presentation and defense counsel's closing argument on sentencing. This Court is required to determine the appropriateness of appellant's sentence, that is, do justice. Article 66(c), UCMJ; *United States v. Healy*, 26 M.J. 394 (C.M.A. 1988). When the Marine Corps implements a policy by written order that gives guidance to commanders for their implementation of that policy, and the guidance includes encouraging Marines to confess to crimes with the implicit understanding that, if they fall within certain specified criteria, they will be held accountable but with less severe consequences than if they do not confess but are subsequently caught, then I

believe this Court is obliged to examine the appropriateness of the sentence approved by the convening authority to examine the appropriateness of the sentence approved by the convening authority in light of that policy. I believe this is particularly required when Marines who fall within the specified criteria of the policy are subjected to sentences substantially similar to those approved for Marines who do not fall within the specified criteria or who got caught. To do otherwise would not be to do justice. In such cases, therefore, I believe this Court must act to correct the injustice. United States v. Healy. I find that appellant fits within the specified criteria of Marine Corps policy. I also find that his approved sentence is as severe as other child sexual abuse cases examined by this Court in the last year and a half (and the least egregious conduct of those I have examined). Finally, since this Court cannot suspend punitive discharges, I find the punitive discharge as approved by the convening authority and as commuted by the majority to be inappropriate.

Accordingly, I would affirm the findings and only so much of the sentence as provides for three years confinement with all confinement in excess of ten months suspended for a period of one year from the date sentence was adjudged, and reduction to pay grade E-1.

APPENDIX G

DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES
MARINE CORPS
WASHINGTON, D.C. 20380

MCO 1752.3A
MHF-25:eal:28
6 Apr 1987

MARINE CORPS ORDER 1752.3A

From: Commandant of the Marine Corps
To: Distribution List

Subj: Marine Corps Family Advocacy Program

Ref: (a) MCO P1700.24A
(b) SECNAVINST 1752.3 (NOTAL)
(c) BUMEDINST 6320.57 (NOTAL)
(d) MCO P1700.8J
(e) MCO 1510.25C

Encl: (1) Family Advocacy Program Definitions
(2) Diagram of Reporting for Family Violence
(3) Child/Spouse Abuse Incident Report (DD Form 2486)

1. Purpose. To publish policies, procedures, and guidance for the operation of the Marine Corps Family Advocacy Program.

2. Cancellation. MCO 1752.3.

3. Background. During the early 1970's, the Surgeon General of the Navy advocated a program dealing with both the medical and the social aspects of the problem of child maltreatment. In 1976, the Chief, Bureau of Medicine and Surgery (BUMED), now Commander, Naval Medical Command (NAVMEDCOM), established the Child Advocacy Program within the Navy Medical Department for the protection of dependent children who were abused, neglected, or abandoned. In 1979, the BUMED program was expanded to include spouse abuse and neglect, incest, and rape, and redesignated as the Family Advocacy Program. Shortly thereafter, the Family Service Center (FSC) Program, as outlined in reference (a), began to improve the quality of life for the Marine family. In reference (b), the Secretary of the Navy established policy on prevention, evaluation, identification, intervention, treatment, follow-up, and reporting of all child and spouse abuse. Reference (c) provides guidance for the medical aspects of this program. This Order is not intended to replace or duplicate naval medical aspects of the program, but rather to inform commanders of their roles and responsibilities in the Marine Corps Family Advocacy Program. All commands, regardless of location, are responsible for the prevention and identification aspects of the program. Enclosure (1) sets forth the definitions of terms used in this Order.

4. Policy

a. Acts of child neglect, child abuse, and spouse abuse, which we will refer to as child and spouse abuse, are incompatible with the high standards of professional and personal discipline required of members of the United States Marine Corps.

b. All commands with a FSC will operate a Family Advocacy Program as delineated in this Order. marine barracks, Marine Corps districts, independent duty, and inspector-instruction commands will conduct programs of prevention, identification, and referral. All commanders down to the battalion or squadron level will appoint a Family Advocacy Program officer, in writing, to carry out the program at the unit level.

c. Commanders must make sure that local military medical treatment facilities and FSC's, if available, maintain a cooperative relationship to maximize the delivery of services to dysfunctional families.

d. Commanders must make sure that they integrate the limited resources into existing programs so that there is no duplication of existing services.

e. Commanders can break the cycle of child and spouse abuse through identification and treatment. They should encourage Marines who are proven performers to enter treatment of rehabilitation programs. Commanders should be guided in their determinations by the following factors:

(1) the Marines' demonstrated record of performance,

(2) potential for future service,

(3) motivation to change the behavior, and

(4) the evaluation by competent counselors or medical personnel that the Marine is a good candidate for successful treatment.

f. Commanders shall apply disciplinary or administrative sanctions for acts of abuse, when considered appropriate. Disciplinary or administrative action is most appropriate when;

(1) offenders fail to acknowledge or assume responsibility for their behavior,

(2) behavior of offenders is compulsive, repeated, and represents a specific danger,

(3) the victim has suffered serious injury, or

(4) there is sufficient evidence for conviction and testifying in court is in the best interest of the victim. Commanders should carefully consider the impact of any punishment on the victim and the entire family.

g. A Marine's entrance to the Family Advocacy Program is not in and of itself a basis for punitive action, revocation of security clearance, removal from base housing, or removal from the Personnel Reliability Program.

h. In instances where investigation reveals other dysfunctions within the family such as drug abuse, alcohol abuse, or indebtedness, refer the Marine to the appropriate military or civilian agency for help. Such referrals will be made before completion of the Family Advocacy Program.

i. Since acts of child and spouse abuse occur within and affect the total family, direct rehabilitation efforts toward the total family, if possible.

j. The FSC will have a Family Advocacy Program coordinator, per reference (a), who will oversee the specific requirements of the program.

5. Objectives

a. The major objective of the Family Advocacy Program is to stop abuse within families. To that end, the program provides a means for the commander to:

(1) Enhance unit readiness by operating programs to restore families suffering from abuse to a healthy state.

(2) Use and integrate on- and off-base resources in setting up preventive programs.

(3) Guarantee interagency, staff, and command cooperation in addressing family advocacy matters.

b. Other objectives of the program are to:

(1) Help Marines in dealing with family abuse.

(2) Provide rehabilitative counseling to family members involved in abuse.

(3) Identify, support, and treat "at-risk" families.

6. Scope of the Program

a. The Marine Corps Family Advocacy Program encompasses the elements of prevention, evaluation, identification, intervention, treatment and rehabilitation,

follow-up, and reporting relative to child and spouse abuse.

b. Use the following categories for identification and reporting purposes:

(1) Spouse abuse.

(2) Child neglect.

(3) Sexual abuse of children.

(4) Physical abuse of children.

(5) Emotional maltreatment of children.

(6) Child abuse and neglect.

c. The evaluation and counseling aspects of the Family Advocacy Program are mandatory for all active duty Marines. Family members may participate voluntarily.

d. The rehabilitative counseling conducted in the FSC will remain strictly short-term and "nonmedical" per reference (a). Extended treatment will be done by the local military medical treatment facilities or appropriate civilian agencies.

e. The key elements of any program dealing with child and spouse abuse must be in keeping with the spirit of rehabilitation and prevention is the most cost effective means for dealing with child and spouse abuse.

7. Philosophy of Family Advocacy

a. Professionals who work with military families have observed patterns that characterize high risk families. For example, most abusing or neglecting parents were themselves abused or neglected as children. Financial difficulties, parenting deficiencies, relocation or family separation, marital difficulties, stressful job assignments, and drug and alcohol abuse are often contributing factors. Much abuse and neglect result from ignorance rather than malevolence. For these reasons, the Family Advocacy Program will be directed at awareness and education in the military community, to include development and implementation of programs that improve parenting skills, marital relations, and stress coping skills.

b. Many Marines involved in child and spouse abuse have a record of solid job performance, and once they are identified as abusive and placed in a treatment program they can usually be taught to alter their behavior. Military families involved in child and spouse abuse are often identified earlier than their civilian counterparts. Such early identification greatly improves the chances of stopping abuse within the family or reducing the level of recurrent violence.

c. In the Marine Corps, most reported cases of abuse occur in the grades of lance corporal to staff sergeant. While reported cases of abuse many be more prevalent in the junior enlisted families, it is not confined there. We must take positive action to report and treat all child and spouse abuse whether it occurs in the officer, staff noncommissioned officer (SNCO), or the junior enlisted grades. The same factors which contribute to abuse in

junior enlisted families also contribute to the abuse found in officer and SNCO families.

8. Credentialing of Family Advocacy Counselors. Because counselors in the Family Advocacy Program must provide the best services possible, quality assurance measures must be established as part of an effective counseling program to reach this goal. Counselors are considered to be credentialed when they possess at least a masters degree in social work, psychology, or related field from an accredited graduate school. Additional credentials or licenses may be mandated by the State where the base is located and are required if such a State program exists. If no State requirements exist for credentialing/licensing, then counselors shall be certified or credentialed by their respective professional societies or the military medical treatment facility quality assurance program.

9. Program Guidance

a. The Family Advocacy Program will operate within the established structure of the FSC where they exist. Base and station commanders will support their tenant organization's Family Advocacy Program. Commanders who are stationed away from the FSC will appoint a Family Advocacy Program officer who can be the focal point for the local Family Advocacy Program.

b. The components of the Family Advocacy Program will include prevention and awareness, education of "at-risk" families, identification and assessment of abuse cases, and disposition of cases.

(1) Prevention. We need a continuing public awareness effort to alert Marines and their families to the phenomena of child and spouse abuse, the characteristics of the offender and the victim, and the services available to help families and individuals. Briefings to personnel are essential to make sure that all Marines understand the methods of reporting abuse cases, and know the consequences of becoming involved personally in abuse situations. Special emphasis and periodic briefings will be given to key personnel who deal with abuse, such as battalion and squadron commanding officers, chaplains, provost marshals and their personnel, staff judge advocates, child care center personnel, family day care providers, Department of Defense (DoD) dependent school personnel, youth recreational activities personnel, and drug and alcohol counselors.

(2) Education of "At-Risk" Families. Those families who are identified as "at-risk" using the criteria given in paragraph 7a, should be provided educational programs and support services. Parenting classes, predeployment and postdeployment programs are strongly suggested for targeted families. These family enrichment programs are of value in preventing abuse in the family.

(3) Identification, Reporting, and Assessment. The 50 states, the District of Columbia, and U.S. Territories require reporting of child abuse/neglect cases to State agencies. Military agencies and individuals within the geographic are served by the military medical treatment facility shall report all incidents of suspected or substantiated abuse directly to the Family Advocacy Representative (FAR) or other designated person who, as

the representative of the military community, will report the incident to the appropriate local or State agency. In overseas locations the same criteria apply if there is no conflict with local laws or status of forces agreements. Cooperation among medical, police, school, and child care personnel is essential to the identification and assessment of child and spouse abuse incidents. Local procedures must be established for ensuring that all incident s of abuse of suspected abuse are reported to the FAR at the nearest miliary medical treatment facility and to the Family Advocacy Program coordinator at the FSC. The provost marshal, child care center, medical facility, and dependents' schools must make sure that reports are submitted on time. The FSC director is responsible for making sure the proper command personnel are told of all abuse cases which are known to the center. Once the abuse case has been investigated, the Case Review Subcommittee (CRS) of the Family Advocacy Committee (FAC) must make a determination of the status of the case (unsubstantiated, suspected, at-risk, or substantiated) and provide rehabilitation recommendations.

(4) Intervention. Often temporary separation of the victim(s) from the offender after an episode of abuse is necessary and desirable to ensure the safety of all concerned. A commander should consider the following actions as possible intervention strategies:

(a) Temporarily remove the military member from the home. Accomplish this by ordering the Marine to stay in the barracks.

(b) Coordinate with local civilian agencies, through memorandums of understanding, to intervene in

cases of child abuse where exclusive Federal or concurrent State and Federal jurisdiction exists. These agencies can remove the child from the home, if necessary, or if in the best interest of the child.

(c) Establish a safe house or shelter to protect victims from further abuse. This is particularly recommended for overseas or isolated duty stations where civilian social service agencies are not available or adequate.

(5) Rehabilitation/Treatment

(a) The goals of rehabilitation are to prevent a recurrence of abuse, repair any lasting physical or psychological damage resulting from the abuse, and return the family to a functional state. Navy medical treatment facilities have the primary responsibility for coordinating or providing medical treatment. The FSC is responsible for assessment, referral, and short-term nonmedical counseling of 1 year or less in duration. Commanders located away from a FSC will determine the rehabilitation program for Marines involved in family abuse after liaison with the nearest military medical treatment facility.

(b) Some problems, by the nature of their severity, long duration, or frequent recurrence are not amenable to treatment. In such cases, seek the advice and help of competent mental health professionals through nearby military medical treatment facilities, when feasible, or through local social service agencies. Administrative separation from the Marine Corps should be considered.

(c) In cases where there is good rehabilitation potential and the Marine has a record of positive performance, the preferred course of action is counseling or mandated rehabilitation and appropriate disciplinary accountability.

(d) When the Marine is retained and placed in a counseling/rehabilitation program, cooperation and participation with the counseling regimen is essential. Failure to cooperate, progress, satisfactorily complete the prescribed treatment, or repetition of the offense will result in disciplinary or administrative action which could include separation from the service.

(e) Treatment length varies with the nature and severity of the problem, but generally should not be longer than 1 year from the date treatment begins. Cases requiring longer periods of treatment must be referred to the FAC for appropriate recommendations and determination. The FAC's recommendation for continued treatment will be forwarded to the Marine's commanding officer. The FAC monitors the treatment or rehabilitation and determines when the goals of intervention have been met. Progress of treatment will be assessed at 6-week intervals. The results of these evaluations, with a recommendation for or against continued treatment, will be forwarded to the Marine's commanding officer. If a permanent change of station (PCS) transfer is anticipated, commanders will coordinate with the Commandant of the Marine Corps (CMC) (MMEA-8 for enlisted personnel or MMOA for officers) to preclude issuance of PCS orders to a Marine who is successfully participating in a rehabilitation program. This coordination must include a

recommendation, such as: "SNM/SNO be stabilized at current command for __ months (not normally to exceed 12 months) to complete a rehabilitative treatment program" or "SNM/SNO be transferred only to a major command in CONUS where rehabilitative treatment is readily available." Marines in treatment/rehabilitation programs will not normally be transferred. At the end of a rehabilitation/treatment program, the individual case will be reviewed to determine availability for worldwide assignment or possible separation from the service.

(f) Marines should be advised that child and spouse abuse may preclude assignment to duty such as security forces, independent duty, overseas accompanied assignments, and billets external to the Marine Corps.

(g) Family members of active duty and retired Marines who are involved in abuse as victims or offenders should be offered counseling or other appropriate intervention, and should be encouraged to participate voluntarily.

(h) Every reasonable effort should be made to maintain the privacy of victims, offenders, and their families. Information will be strictly safeguarded and held in a confidential manner to include in-take forms, case records, medical reports, Naval Investigative Service (NIS)/Criminal Investigation Division (CID) investigations, and other administrative records.

(i) All family advocacy case files shall contain a standard Privacy Act statement signed by a parent or guardian in cases of child abuse/neglect or by the victim in cases of spouse abuse. Treatment of

children will not be denied because of parental/guardian refusal to sign the Privacy Act statement. When a parent/guardian refuses to sign a Privacy Act statement an entry will be made in the family advocacy case file.

(j) If the military member is transferred to another military installation, while the case is active, a copy of the active family advocacy case file will be forwarded to the Family Advocacy Program coordinator at the FSC of the gaining military base. If for any reason the Family Advocacy Program coordinator at the FSC feels that other follow-up is needed, the FSC will forward the family advocacy case file to the gaining FSC.

(k) If after 1 year from the date of the last reported incident of abuse or completion of treatment there have been no further indications of maltreatment, an active file shall be closed. Five years after closure local records will be destroyed.

(l) The case file will be reopened if further incidents of abuse occur. Any incidents leading to the reopening of a particular case should be evaluated by the appropriate case review subcommittee. Any military members who continue acts of violence towards family members after receiving appropriate intervention and/or counseling may be considered for separation from the service at the discretion of the commanding officer.

(m) If the military member is separating from the military service while undergoing a rehabilitation program, every effort should be made to coordinate follow-up with appropriate civilian agencies.

(6) Rape. Rape and sexual assault are violent crimes. Awareness and prevention programs are part of an overall Family Advocacy Program. The FSC may offer follow-up counseling and support groups. Victims of rape and sexual assault must be treated with respect and dignity, and their privacy maintained as much as possible. They should be supported emotionally and afforded every opportunity to seek guidance, counseling, and medical attention.

(7) Coordination

(a) Family advocacy issues are multifaceted and involve responses from a large number of military and civilian agencies. Coordination of activities by all agencies involved with the resolution of cases is essential to an effective program. The Family Advocacy Program coordinator will effect the necessary coordination to operate the nonmedical aspects of the program. The FAR will effect the necessary coordination to operate the medical aspects of the program per reference (c).

(b) The director of the FSC or the program coordinator will coordinate rehabilitative programs. The Family Advocacy Program coordinator should arrange with tenant naval medical treatment facilities or with off-base social service agencies to identify suitable rehabilitative programs for eligible Marines and their families. Marine Corps districts, barracks, and independent commands should coordinate rehabilitative services through nearby military medical treatment facilities when feasible or through local social service agencies. The closest FSC is responsible for short-term, nonmedical counseling, and may be of help in referral to

civilian treatment programs.

(c) Special care should be taken to make sure that family members who are involved in abuse or neglect are offered rehabilitative treatment services, either directly or through referral. Even in cases where the Marine is separated for abusive or neglectful behavior, refer the family to appropriate civilian agencies to enhance protection of victims and promote recovery of the family.

(d) All personnel dealing with Marines who are substantiated or suspected child or spouse offenders should be cautioned concerning the sensitive nature of these offenses. Commanding officers will safeguard personal information in all cases.

(8) Jurisdiction

(a) The Federal Government has taken no affirmative action to assume jurisdiction in Federal courts or to specifically divest individual States of jurisdiction to hear civil child abuse and child neglect matters in State courts. Thus, local state agencies may deal with cases of child abuse and child neglect on Marine Corps installations, even in areas of exclusive Federal jurisdiction. Memorandums of understanding between the installation and the appropriate State agencies should be used to facilitate the evaluation, identification, intervention, treatment, and follow-up of family violence cases. Memorandums of understanding with appropriate agencies concerning State involvement in cases of child abuse and child neglect are desirable in areas of concurrent State and Federal jurisdiction, as well as areas of exclusive Federal jurisdiction. For example,

State child protective services personnel could accompany military police on initial investigations of alleged child abuse and child neglect on base. Such a program would aid in the assessment of abuse and the need for possible temporary or foster placement of abused and neglected children.

(b) Overseas commands may encounter foreign jurisdictional procedures that will preclude mandatory rehabilitation of military dependents who are involved in cases of abuse. In such cases, the Marine sponsor will be encouraged to place the offending dependent in a voluntary U.S. sponsored program. In all cases, proper measures will be referral of the family to a CONUS command.

(c) The parent command has the ultimate responsibility for the jurisdiction and disposition of cases reported through the command.

(9) Voluntary Self-Referral

(a) Marines and family members who are potential or actual offenders should be encouraged to seek help at the earliest opportunity. Any Marine, family member, or overseas civilian employee may obtain treatment or aid for a child or spouse abuse problem by means of self-referral. Military members who seek treatment or help for domestic violence problems may initiate the evaluation and intervention process by voluntarily disclosing the nature and extent of their problem to qualified family advocacy or counseling personnel.

(b) Admission of child or spouse abuse by an offender is sufficient evidence to substantiate a case and requires notification of the member's commanding officer.

(c) Determination as to whether a voluntary self-referral has been made rests with the individual's commanding officer. The clearest case of self-referral occurs when only the offender and victim are aware of the abuse prior to the voluntary disclosure. There are cases in which self-referral, in the strictest sense, cannot be established, such as a member coming forward following a spouse's discovery of child abuse. Consideration should be given for the essentially voluntary nature of this type of disclosure. Early resolution of this issue is required in order to prevent confusion as the case develops.

(d) Voluntary disclosures of child or spouse abuse made by a member to the proper family advocacy or counseling personnel will not be used against the member as the sole source of information upon which to base disciplinary action under the Uniform Code of Military Justice, nor as the sole basis for characterizing a discharge as "Other than Honorable" provided that such information is disclosed by the member for the express purpose of obtaining help or treatment. This does not preclude administrative processing or reporting actions which must be taken in compliance with State law, nor is the member protected against possible civilian prosecution.

(e) Qualified family advocacy or counseling personnel who may receive voluntary self-referrals include the FAR, medical officer, FSC

counselor, and drug and alcohol abuse counselor. Commands who have no qualified family advocacy or counseling personnel may designate personnel to act in this capacity.

(f) Information disclosed by a member to other persons (other than qualified family advocacy or counseling personnel) is not protected under this Order. Information disclosed in response to official questioning in connection with an military or civilian investigation is not considered information disclosed for the purpose of seeking or obtaining treatment.

(g) In those instances where voluntary self-referral is made to persons other than the designated FAR, the case will, after initial screening, be referred to the FAR for further action. The FAR, as the medical treatment facility representative, will notify the member's commanding officer and the FSC giving appropriate recommendations concerning eligibility for the Family Advocacy Program and command action in support of the counseling or treatment regimen.

(h) Admissions of child or spouse abuse, or other information given by an offender of such abuse, is not "privileged" within the legal meaning of the term. consequently, personnel with knowledge of such admissions or similar information are required to notify the appropriate authorities as provided for in this Order. Furthermore, if called upon to testify in a pretrial investigation, court-martial, or other official proceeding, personnel could be required to divulge such knowledge.

(i) Military members who are voluntary self-referrals shall follow the treatment program

determined by the Family Advocacy Program coordinator and the Family Advocacy Committee.

9. FAC. The base or station commander where an FSC exists will, with the help of the commanding officer of the local naval medical treatment facility, publish directives pertaining to the effective development and operation of the Family Advocacy Program. These directives will include implementing procedures and protocols for the management (identification, intervention, referral, and reporting) of individual cases of child and spouse abuse.

a. The base or station commander, with the help of the commanding officer of the naval medical treatment facility, shall establish an area multidisciplinary FAC that will:

(1) Provide recommendations for Family Advocacy Program policy and procedures.

(2) Facilitate military and civilian interface and integration of social service delivery.

(3) Facilitate an integrated team approach among all agencies which are involved with the Family Advocacy Program.

(4) Conduct ongoing needs assessment and evaluation of the Family Advocacy Program.

(5) Recommend new resources and programs, as needed.

(6) Identify long-range, intermediate, and immediate needs and initiate action to carry them out.

(7) Serve as advocates for families and children.

(8) Review, approve, and recommend all requests for treatment periods longer than 1 year to the Marine's commanding officer.

(9) Monitor all treatment or rehabilitation and determine when the goals of intervention/rehabilitation have been met.

(10) Forward the results of these evaluations, with a recommendation for or against continued treatment, to the Marine's commanding officer.

(11) Review the cases of repeat child/spouse abuse offenders who are not making satisfactory rehabilitation progress, and make a retention recommendation to their commanding officers.

b. FAC membership will be by invitation of the base or station commanding and will be broadly representative of the service providers and community for which family advocacy services are provided. The chairperson of the committee will be a Marine field grade officer and be appointed in writing by the base or station commander. General membership will include, but need not be limited to, the following:

(1) Command representative (chairperson)

(2) Medical facility representative (co-chairperson)

(3) Family Advocacy Program coordinator

(4) FSC representative

(5) Tenant command representatives (e.g., wing, division, FSSG)

(6) Medical facility (FAR)

(7) Dental representative

(8) Chaplin's representative

(9) Provost marshal's representative

(10) Staff judge advocate representative

(11) NIS representative

(12) Local substance abuse office representative

(13) Child care center representative

c. The CRS should be established to make the actual medical determinations of whether abuse is substantiated, suspected, at risk, or unsubstantiated. A medical representative should chair the subcommittee. Reference (c) lists additional responsibilities of the CRS.

10. Medical Facility Support. Reference (c) establishes policies and guidance for the Family Advocacy Program at naval medical treatment facilities under the purview of

the Commander, NAVMEDCOM. Commanding officers of medical treatment facilities are responsible for the implementation of the program at their facility and will offer the following services in support of the program:

a. Establishment of local policies and directives necessary to carry out the program at the medical facility.

b. Designation of FAR with primary duties of managing the medical treatment facility program. The FAR, acting on behalf of the FAC and medical facility commanding officer, is the point of contact for unit commanding officers concerning medical treatment and intervention matters pertaining to family advocacy. The FAR will:

(1) Receive all reports of suspected or known cases of abuse.

(2) Refer all cases to the FAC for review and action.

(3) Refer cases for treatment and action to other agencies as appropriate.

(4) Provide for protection of the victim when civilian social services agencies are not available.

(5) Coordinate all aspects of case management, including reports to NAVMEDCOM.

(6) Notify the member's commanding officer and the FSC of all substantiated cases. This notification will normally include a general

description of the problem and recommendations about command support needed.

c. Collaboration with the base or station commander in setting up a multidisciplinary FAC.

d. Appointment of a medical officer to represent the activity as co-chairperson of the FAC.

e. Appointment of medical officer to chair the CRS as required.

11. Funding and Budgeting

a. Commanders will fund the Family Advocacy program using operation and maintenance Marine Corps (O&MMC) funds at a level sufficient to maintain the program. Submit specific budget needs annually per reference (d), and display them as part of the operating budget for the FSC.

b. Additional funds may be available on a year-to-year basis from the DoD. This specially appropriated money must be requested by commands and justified using the guidelines provided by CMC (MHF). the budget submissions will normally be completed in May and October of each year to coincide with regular DoD budgeting cycles. Separate letters will be published by CMC (MHF) each year, as appropriate, requesting these budget submissions.

12. Reports

a. reports are required through the naval medical system to provide information to the Central Case

Registry and document the incident rates of child and spouse abuse. The basic Family Advocacy Program reporting system is charted in enclosure (2). The FAR is responsible for completing and forwarding incident reports of abuse to the NAVMEDCOM. Abuse cases are classified as unsubstantiated, suspected, at-risk, or substantiated. The official determination of a case is made by the CRS based on the investigation by the FAR and other information from committee members.

b. The current format for reports submitted by the FAR to the NAVMEDCOM is contained in enclosure (3).

c. The FSC will report workload statistics as part of the FSC Activities Report per reference (a).

13. Action

a. The CMC (MHF) will:

(1) Designate a Family Advocacy Program Manager.

(2) Develop policies and procedures for operating the Family Advocacy Program.

(3) Provide representation to DoD and other Family Advocacy Program committees and councils.

(4) Maintain liaison with the Military Family Resource Center in Washington, DC, to keep abreast of the latest information and developments concerning child and spouse abuse and provide

proper guidance to commanders.

(5) Compile child and spouse abuse statistics and coordinate with the NAVMEDCOM in monitoring the cases reported through them.

(6) Conduct periodic visits and inspections to evaluate the operation of the Family Advocacy Program through the Marine Corps.

(7) Submit justification to DoD for auxiliary funds for the program.

b. Commanders who operate an FSC will:

(1) Establish and monitor a Family Advocacy Program by publishing a local directive.

(2) Appoint a Family Advocacy Program officer to act as the point of contact for all matters relating to child and spouse abuse at the FSC.

(3) Utilize the FSC to coordinate the Family Advocacy Program.

(4) Set up command awareness and prevention programs to educate all Marines and their families about child and spouse abuse and its tragic consequences.

(5) Collaborate with the commanding officer of the naval medical treatment facility to set up procedures to handle and report child and spouse abuse cases.

(6) Establish a FAC, with the assistance of the naval medical treatment facility, and provide multidisciplinary representation to evaluate cases referred to the committee.

(7) Be guided in the disposition of child and spouse abuse cases by the directions given in this Order.

(8) Make sure child and spouse abuse cases are handled discreetly and fairly for both Marines and family members.

(9) Make sure there is coordination among all military and civilian agencies involved with investigating, counseling, evaluating, or dealing with abuse.

(10) Submit budget needs annually per reference (d) and guidelines provided by CMC (MHF).

(11) Report workload statistics as part of the FSC Activities Report per reference (a).

c. All commanders of independent commands will:

(1) Appoint a Family Advocacy Program officer, in writing, to coordinate a Family Advocacy Program for the command following this Order.

(2) Make sure the command offers programs in identification and prevention of child and spouse abuse as part of the Troop Information Program per reference (e).

(3) Develop close liaison with civilian agencies which deal with child and spouse abuse to make sure resources are available to meet the needs of members of the command.

(4) Develop a relationship with the closest FSC and the Family Advocacy Program coordinator to act as a resource for information about new developments in the program and to help with referral to appropriate services in the command's area.

(5) Manage child and spouse abuse cases to make sure the interests of the Marine Corps, the individual Marine, and the Marine's family are paramount.

(6) Assign, in writing, those military members they determine will benefit from an appropriate rehabilitation program.

d. Other commanders down to battalion/squadron level at commands with a FSC will:

(1) Appoint a Family Advocacy Program officer, in writing, to coordinate a Family Advocacy Program for the command following this Order.

(2) Make sure the command offers programs in identification and prevention of child and spouse abuse as part of the Troop Information Program per reference (e).

(3) Assign, in writing, those military members they determine will benefit from an appropriate

rehabilitation program as recommended by the Family Advocacy Program coordinator and the FAC.

e. The Director of the FSC will:

(1) Operate the Family Advocacy Program in consonance with this Order and the directions of the commander.

(2) Keep apprised of new developments within the program which may go beyond the scope of the current Order.

(3) Work closely with independent commands in their areas to pass information and help in developing Family Advocacy Programs.

f. The Family Advocacy Program coordinator will act as point of contact and conduit for information to the command regarding the Family Advocacy Program.

14. Reserve Applicability. This Order is applicable to the Marine Corps Reserve to the extent that reservists and family member may participate in awareness and education classes taught as part of the prevention of child and spouse abuse; other aspects of this Order are not applicable.

/S/ E. C. CHEATHAM, JR.
Deputy Chief of Staff
for Manpower

Before we discovered a formula that worked on life-threatening infections, we tested 3,000 that didn't.

Pfizer

Once we uncovered an answer, we didn't stop there. We then tested 27,000 additional formulas to ensure we had the best one. In the end, Pfizer's commitment resulted in a major breakthrough in treating certain infections in people with suppressed immune systems—such as cancer patients on chemotherapy and people with AIDS. With the power of innovation, we can find even more breakthroughs tomorrow. **WE'RE PART OF THE CURE.**